Second Division.

2. *June* 1834.

OPINIONS OF JUDGES,

IN PROCESS

THE FACULTY of PHYSICIANS and SURGEONS of GLASGOW,

against

THE UNIVERSITY of GLASGOW, and OTHERS.

HOPKIRK & IMLACH, W. S. Agents for Faculty.
W. A. G. & R. ELLIS, W. S. Agents for the University.

Mr Ferguson, Clerk.

OPINIONS OF JUDGES,

IN CONSULTATION ON THE CASE

The FACULTY of PHYSICIANS and SURGEONS of GLASGOW;

AGAINST

The UNIVERSITY of GLASGOW, and OTHERS.

JAMES the VI., by his charter or letter of gift, dated the 29th November 1599, in favour of Mr Peter Low, chief surgeon to his Majesty and the Prince, and Mr Robert Hamilton, professor of medicine, and their successors, indwellers of the city of Glasgow, conferred upon them certain powers and privileges for the purpose of regulating the practice of surgery and medicine in the burghs of Glasgow, Renfrew, and Dunbarton, and in the

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sheriffdoms of Clydesdale, Renfrew, Lanark, Kyle, Carrick, Ayr, and Cunninghame, and also for the inspection of drugs sold in Glasgow. It sets forth, as the inductive cause of the grant, that ignorant, unskilled, and unlearned persons, under the colour of being surgeons, had abused the people, destroyed an infinite number of the King's subjects, and escaped without punishment. To remedy this evil, by the *first* clause, Low and Hamilton, and their successors, are empowered, under the name of visitors, to call before them all persons professing or using the art of surgery within the bounds specified, to examine them upon their literature, knowledge and practice, if found worthy, to admit, allow, and approve them, to give them a testimonial according to their art and knowledge, to receive their oaths, and to authorise them to practise accordingly. The visitors are further empowered to discharge or prohibit persons to practise farther than they are found qualified. If those who are cited are contumacious, they are to be fined by an order, on which letters of horning and poinding are to pass, and if necessary, of caption, till caution is found to appear for trial. By the *second* clause, the visitors are directed to inspect the bodies of those who are hurt or killed; and, by the *third*, to make statutes as to the practice of the art, with the advice of their brethren. By the *fourth* clause, it is provided that no person shall exercise *medicine* within the bounds specified in the grant, without the testimonial of a famous University where medicine is taught, or a license from the King and Queen's Physicians; and the visitors are empowered to interdict transgressors under certain penalties. The *fifth* and *sixth* clauses relate to the inspection of drugs in Glasgow;—the *seventh* provides for gratuitous assistance to the poor;—and the *eighth* confers certain exemptions from public burdens.

It will be remarked, that throughout the whole of this charter, surgery and medicine are carefully distinguished. Thus, the visitors have power to examine and license those who practise surgery; but they have no power to examine and license those who practise medicine. As a board of police, they may interdict unqualified persons to practise medicine, but the qualification for practice is not a license from the grantees, but a license from the King and Queen's chief Physicians, or the testimonial of an University where medicine is taught. The charter does not expressly erect the grantees into a corpora-

tion, but as they and their successors were to form a perpetual board, and were empowered, with the advice of their brethren, to make statutes to regulate the practice of surgery, they held themselves to be a Corporation, exacted fees from entrants, like other crafts, and admitted the Barbers into their association. It is unnecessary to inquire whether the charter warranted these proceedings, because they were acquiesced in; and at an early period the visitors and their brethren were held in Courts of law as a Corporation or Faculty by virtue of their charter. Afterwards a seal of cause was granted by the Magistrates to the surgeons and barbers, narrating the charter of James VI., and conferring the usual political privileges within burgh. The seal of cause is to the surgeons and barbers *allenarlie*, who are thus distinguished from practitioners of medicine, or physicians.

17. Dec. 1701. Surgeons and Apothecaries of Glasgow.

The charter of James VI. was ratified in Parliament in 1672, by an act in favour 'of the present surgeons, apothecaries, and 'barbers within the burgh of Glasgow, and their successors *allen-* '*arly;*' and in that statute medicine and surgery are again contradistinguished.

It appears, indeed, that the Corporation or Faculty, as early as 1635, put forward a pretension, not only to interdict those who practised medicine without an University degree, or a license from the King and Queen's Physicians, but to examine and to grant licenses themselves,—a pretension certainly unauthorized by the charter; and to give a colour for it there is a misrecital of the charter in the statute 1672. Whether in consequence of usage or otherwise, they have now acquired that right, it is unnecessary at present to inquire. In reference to this question, it is enough that the distinction between surgery and medicine is clearly recognized in all the grants to the Corporation or Faculty, whether by the Crown, by Parliament, or by the city of Glasgow; and though the privileges of the Faculty may have been extended by usage, there has been no usage on the other side to restrict them.

Keeping this distinction in view, it appears from a perusal of the charter, that the grantees are empowered to examine every person within their bounds, professing or using the art of surgery, and to give or withhold a license to practise that art, or any department of it, according as he shall be found qualified. To that privilege there is no exception whatever. It is otherwise with regard to medicine. Whether the Faculty have or have not ac-

quired by usage, a right to examine in medicine, which was not conferred by the charter, a testimonial or diploma from an University where it is taught, constitutes a good title to practise, and to exempt the possessor from the necessity of obtaining a license from the Faculty. But in surgery, neither a license from the King's and Queen's Physicians, nor the diploma of a University, nor any other ground of exemption, is admitted. This being the import of the charter, it follows, that if the Crown had power to grant it, the individuals, parties in this cause, who have obtained diplomas as Masters of Surgery, may, notwithstanding, be interdicted by the Faculty, unless they submit to trial.

To escape from this conclusion, the University of Glasgow, who are the pursuers of the declarator in these conjoined actions, have put a different construction on the charter 1599. They maintain, that surgery is a department of medicine, and comprehended under that term; and hence they infer, that as a testimonial or diploma from an University is declared in the charter to be a title to practise medicine, it must be held as a title to practise surgery also. We are of opinion that that plea is unfounded. Medicine and surgery are essentially different; science and observation alone will qualify an individual to practise medicine, but to the successful practice of surgery, manual dexterity is also and chiefly requisite. It is proved by the documents in process, that they were separate professions in the reign of James VI., as they are at the present day, or rather, they were kept still more distinct at that time, surgery being looked on more as a mechanical art, and connected with the craft of the barbers. If King James had intended that a medical diploma was to exempt the possessor from an examination in surgery, he would have introduced it as an exception to the first clause of the charter, which relates to surgery alone, and not to the fourth clause, which relates solely to medicine. In like manner, if the University's diploma had been a title to practise surgery, it would have been noticed as such in the seal of cause to the surgeons, and in the Parliamentary ratification of the charter. But it is unnecessary to dwell on this
b. 1819. point, because, in the recent case of Steel and others, the Court, after full argument, decided, that a diploma in medicine does not authorize the possessor to practise surgery within the limits of the Faculty's grant.

In support of the same view, the pursuers of the declarator have argued, that the Faculty have no power under the charter to

interdict the practice of surgery by unlicensed persons, except by virtue of the *fourth* clause, or, as they term it, the prohibitory clause; and then only on the assumption, that surgery is there comprehended under the term medicine. But this is plainly a mistake; for the first clause confers express power to admit and authorize those who are qualified to practise surgery, to discharge or interdict those who are not qualified, and to compel all surgeons to appear for examination by means of fines and imprisonment. The first clause, therefore, is no less prohibitory than the fourth; but the fourth, which applies to medicine, admits of an exception, while the first, which applies to surgery, does not.

The chief ground on which the pursuers of the declarator rely, is, that the Crown has no power to erect a Corporation of Surgeons, with privileges which the charter would confer, if taken in the sense in which it is construed by the defenders, because such privileges would be inconsistent with the rights of the Universities established before the date of the charter; and, in particular, would derogate from the effect of their diplomas in medicine, which are said to give authority not only to teach, but to practise.

With regard to the power of the Crown to erect a Corporation of Surgeons, with exclusive privileges, the usage of Scotland, as well as of England, and it is believed of every other feudal country in Europe, is decisive. The London Corporation or College of Surgeons, with exclusive privileges, and particularly with the privilege to examine and authorize practitioners of surgery within their bounds, was erected in the reign of Henry the VIII., and sanctioned by various acts of Parliament in that reign. Similar powers were also conferred, in the same reign, on a College of Physicians. In Edinburgh the corporation of surgeons was erected by a seal of cause in 1515, which was afterwards ratified by a charter from the Crown in the reign of James V.,—and the Corporation was established as one of the deaconries by the decreet-arbitral of James VI. The exclusive privileges of those Corporations have been sanctioned by various decisions in both countries, both as to monopoly of practice and the power of granting licenses. With regard to the privileges of the Universities, it must be remembered that they were of old, Ecclesiastical corporations, and that their testimonial or diploma confers no civil or municipal right, except in so far as is allowed by statute or usage. In the words of the Court

of King's Bench, in the case of West, 'testimonials from the Uni-
'versity, upon taking the Doctor's degree, have the nature of a re-
'commendation; they may give a man a fair reputation, but con-
'fer no right.' On that ground, the Court of King's Bench, both in that case and in the case of Lovett, referred to in the pleadings, determined that a man who had taken his degree of Doctor of Physic at Oxford, could not practise in London, or within seven miles of it, without a license from the College of Physicians, which was incorporated by the 14th and 15th Henry VIII., c. 5. Those cases are the more decisive, because the statute erecting that college had in express terms reserved the privileges of the Universities. And we think they may with propriety be referred to as authoritative in this case, as there is no reason to hold that the law of Scotland differs from that of England with regard to the privileges of Universities, at least as to the effect of degrees.

1. Lord Raymond 472, 16 Mod. 354.

When this Court, therefore, in the case of Steel just mentioned, found that persons who had graduated at the University in physic, were entitled to practise physic in Glasgow without a license from the defenders, we apprehend the judgment proceeded, not on the ground that the diploma *per se* conferred that privilege, to the exclusion of all corporate rights, but, on the contrary, that it proceeded on the ground that the charter of the defenders contained an exception to that effect,—an exception, as already observed, confined to medicine, and not extending to surgery.

The pursuers have said that, at the date of the charter of James VI. in 1599, surgery was not taught in any of the Scotch Universities, at least degrees in surgery were not conferred; and they state this to be the reason why an University's testimonial in surgery is not recognised in the charter as an exemption from the Faculty's right to examine and license. Farther, they say that no degrees in surgery were granted from that time till after the action against Steele and others occurred; and that this accounts for the judgment of the Court in that action, by which it was found, that a degree in medicine is no license to practise surgery. It is unnecessary to remark the inconsistency between this argument and the position they previously maintain, that a degree in medicine comprehends a degree in surgery also, as a department of medicine. But if we are correct in the view now taken, even if surgery had been taught at the date of the charter, and degrees in surgery granted, they would have conferred no exemption, unless an express exception to that effect had been inserted

in the charter; since University degrees cannot control the privileges of a Corporation, unless it is so provided in the charter of erection, or unless a law to that effect has been subsequently introduced by statute or usage. Nor did the judgment in Steel's case rest on that ground; for it was observed on the Bench, that there might be good reasons why surgeons should be examined by the Faculty in Glasgow, though they held University degrees.

We are of opinion, therefore,—

1. That the Faculty of Physicians and Surgeons in Glasgow are a legal corporation.

2. That the Faculty, by virtue of the charter 1599, ratified by Parliament in 1672, have power to debar, from the practice of surgery, persons who have not submitted to examination before them, or who have not obtained their license to practise.

3. That the degree of Doctor of Physic from a University where medicine is taught, does not entitle the graduate to practise surgery within the bounds specified in the charter, unless he obtains a license from the Faculty.

4. In like manner that a testimonial of skill in surgery from a University where surgery is taught, or the degree of Master in Surgery, recently introduced in the University of Glasgow, does not entitle the possessor to practise surgery within these bounds, unless he submits to examination by the Faculty, and is licensed by them.

To these observations it may be proper to add, That we entertain no doubt that there is an University at Glasgow, with as ample power to confer degrees as any other University in the kingdom. It has been recognised in grants from the Crown, by Royal visitations, in public statutes, and in decisions of this Court, in a great number of instances. The mistake of the defenders on this point, seems to have arisen from their confounding the University of Glasgow with the College of Glasgow; but those bodies are distinct, as was found by the decision of this Court, in

the case of Muirhead *against* the College of Glasgow, 16th May 1809.

We think it unnecessary to inquire, whether the University of Glasgow has power to grant degrees, or testimonials of skill in surgery. Admitting that the University possesses that power, and supposing it had been exercised from the date of the erection in 1450, we are of opinion, on the grounds above stated, that such degrees or testimonials would be of no avail in a question with the Faculty. If they had been in use at the date of the charter, it is possible that James VI. might have admitted an exception in their favour, with regard to the practice of surgery, as he has done in favour of medical degrees with regard to the practice of medicine; and as they are now granted, they may perhaps induce the Legislature to restrict the privileges of the defenders. But as the law stands at present, we are of opinion they cannot control the express and unambiguous terms of the charter 1599, ratified in Parliament, and uniformly acted upon.

We have not taken into view the plea of prescription urged by the defenders. Their case would certainly have been much more doubtful, if they had been compelled to resort exclusively to that plea. Although they had from time immemorial exercised the power of debarring from the practice of surgery those who had not submitted to examination, even including graduates in medicine; yet agreeably to the maxim *tantum præscriptum quantum possessum*, that usage would not have conferred a right to exclude those who had the University's diploma of skill in surgery recently introduced, assuming that the University has power to grant it, which the pursuers maintain on very plausible grounds. But the defenders, standing on their charter, are entitled to plead that their privilege strikes at every person not expressly excepted, and the charter contains no exception applicable to the practice of surgery.

C. Hope.
David Robertson Williamson Ewart.
Ad. Gillies.
J. H. Mackenzie.
J. H. Forbes.
Geo. Cranstoun.
John Fullerton.

Note by Lord Medwyn.

I entirely agree in this Opinion. When this cause was pleaded before me in the Outer-House, I early formed this opinion, and would have so decided; but I thought as the case had been very anxiously and elaborately pleaded, and as a great variety of documents had been founded on, that it would be presented for review in a more convenient form, by having written pleadings on both sides. Afterwards, when the University appeared to support the effect claimed for their Degrees in Surgery, I thought it more becoming the respect due to that learned Body, to obtain at once the decision of the Court, although my own views of the case were not in any wise altered by their appearance or pleading. I therefore made avizandum with the cause, and, according to my usual practice in such cases, without presuming to offer any opinion of my own.

J. H. F.